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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHERRIL PANTEAU, Defendant and Appellant.	2d Crim. No. B223309 (Super. Ct. No. NA073114) (Los Angeles County)

Cherril Panteau appeals the order revoking her probation and executing a previously imposed and suspended five-year state prison term following her no contest plea to selling, transporting, or offering to sell a controlled substance (Health & Saf. Code, § 11352, subd. (a)). Appellant filed an opening brief contending her trial attorney provided constitutionally ineffective assistance of counsel by failing to object to imposition of the upper term. We requested supplemental briefing addressing (1) whether appellant can successfully challenge her previously imposed sentence on the ground of ineffective assistance of counsel; and (2) whether she is entitled to additional presentence conduct credits under the 2010 amendments to Penal Code[1] section 4019.

[1] All further undesignated statutory references are to the Penal Code.

We shall order the judgment modified to reflect an additional 57 days of presentence conduct credit. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 29, 2007, appellant pled no contest to selling, transporting, or offering to sell a controlled substance. Pursuant to a plea bargain, imposition of sentence was suspended and appellant was placed on three years formal probation. Appellant was also ordered to complete 60 days of community service, refrain from taking illegal drugs, and submit to random drug testing. The court stated that "you need to get going with your community service as soon as possible. Don't wait to the last minute. You should do at least one day per week." Appellant also expressed her understanding that any violation of her probation could result in a five-year prison sentence.

On May 22, 2008, appellant's probation was revoked. At a subsequent hearing on June 12, 2008, appellant's attorney stated: "We were willing to admit violation today, if the court will consider the probation report. It is favorable." Counsel added that the recommendation was to reinstate probation. The court noted that appellant had multiple positive drug tests and failures to test.

The court stated its concern that "[appellant] pled to this case January 29, 2007, which means it has been 17 months since she pled. She was ordered to do 60 days of community service at the rate of one per week. She has done about four days." The court further noted, "[s]he was given a break, placed on probation" while her codefendant was sentenced to prison. Counsel replied that "[i]n regards to the merits of the underlying case, she apparently had driven the co-defendant to a location where he participated in a drug sale that she knew nothing with [*sic*] about. She happened to be there." The court responded, "Well, you know what? She already pled, so not going to contest it. . . . This is what I am going to do. First violation, I will reinstate it. I am going to suspend five years in state prison suspended." The court told appellant: "You don't do your community service, you are going to go to prison for five years. Do you understand that, ma'am?" Appellant replied in the affirmative, then waived her right to a probation violation hearing and admitted being in violation of her probation. The court revoked

and reinstated probation with the same terms and conditions, including that she perform 60 days of community service at the rate of one per week. The court also imposed and stayed execution of a five-year state prison term.

Appellant's probation was revoked for a second time on November 9, 2009. A supplemental probation report indicated that appellant had submitted a positive drug test and had subsequently failed to report for two other scheduled tests. Another supplemental report reflected that appellant was not complying with the condition that she perform at least one day of community service every week. At the hearing on January 14, 2010, appellant's attorney asked the court to place her in a residential treatment program. The court told appellant: "You have been here before on a violation. Last time you were here it was a five year suspended sentence." After appellant admitted violating her probation and waived her right to a hearing, the court ordered execution of the previously imposed five-year prison term. Appellant subsequently retained new counsel who filed a notice of appeal on her behalf. Appellant also requested a certificate of probable cause on the ground, among others, that her prior attorney had provided ineffective assistance of counsel by failing to object when the court imposed the high term of five years. The request for a certificate of probable cause was denied.

DISCUSSION

I.

Ineffective Assistance of Counsel; No Certificate of Probable Cause

In her opening brief, appellant contends her trial counsel provided ineffective assistance by failing to object when the court sentenced her to the five-year upper term. She claims that counsel should have argued for a lesser term, and that the court could not rely on appellant's failure to perform the community service condition of her probation without running afoul of *Cunningham v. California* (2007) 549 U.S. 270.

The People correctly respond that the court had no authority to sentence appellant to a lesser term because it committed her to prison pursuant to a previously imposed judgment in which execution of the sentence was suspended and appellant was reinstated on probation. (Cal. Rules of Court, rule 4.435(b)(2).) At this point, the court

had the choice to either reinstate appellant on probation, or order execution of the previously stayed five-year sentence. It could not change the length of the previously imposed term, which had long since become final and had not been appealed. (*People v. Howard* (1997) 16 Cal.4th 1081, 1084, 1094; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424.) The People also correctly note that appellant's ineffective assistance of counsel claim would in any event fail because the court was not constitutionally required to make any factual findings in order to impose the upper term. (*People v. Sandoval* (2007) 41 Cal.4th 825, 849-850.)

Moreover, any right appellant may have had to claim that her prior attorney's failure to object to the term amounts to ineffective assistance (see *People v. Munoz* (1975) 51 Cal.App.3d 559, 563) is precluded because the judgment on appeal follows appellant's admission of a probation violation and she did not obtain a certificate of probable cause pursuant to section 1237.5. The only claims that can be raised without a certificate are those involving alleged errors that both (1) took place after appellant admitted violating her probation; and (2) do not implicate the validity of the admission. Strictly construing section 1237.5 (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098), it is clear that appellant cannot challenge a previously imposed prison sentence that became final long before she admitted the probation violation that led to its execution.

II.

Presentence Custody Credits

When appellant was sentenced on January 14, 2010, section 4019 provided that she was entitled to two days of conduct credit for every four days of actual custody. Under the version of section 4019 that went into effect on January 25, 2010, certain defendants such as appellant earn what are referred to as one-for-one presentence conduct credits, which are actually two days of conduct credit for every two days in custody. (Stats. 2009-2010, 3d Ex. Sess. ch. 28, § 50.)**2** We requested supplemental briefing

2 On September 28, 2010, section 4019 was amended to restore the former computation for prisoners confined for crimes committed after the amendment went into effect. (Stats. 2010, ch. 426, § 2; § 4019, subds. (b) & (g).) That same date, section 2933 was amended

addressing whether appellant is entitled to additional conduct credits under the amendments that went into effect after she was sentenced. We conclude that she is.

The amended statute does not state whether it applies retroactively or prospectively. However, absent a savings clause, legislative enactments that mitigate punishment are traditionally deemed to operate retroactively. (*In re Estrada* (1965) 63 Cal.2d 740, 748 (*Estrada*); *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying *Estrada* to amendment allowing award of custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [applying *Estrada* to amendment involving conduct credits].) We hold that, pursuant to *Estrada,* the amendment applies retroactively because it mitigates punishment by reducing the period of imprisonment.

Our Supreme Court has granted review to resolve a split in authority over this issue and will, of course, have the final say on the matter. (*People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 [holding the amendment is retroactive]; contra, *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.) We note, however, that a majority of published cases on the issue agree that the amendment to section 4019 is retroactive. (*People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782; *People v. Keating* (2010) 185 Cal.App.4th 364, review granted Sept. 22, 2010, S184354; *People v. Pelayo* (2010) 184 Cal.App.4th 481, review granted July 21, 2010, S183552; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813; contra, *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314; *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted Sept. 22, 2010, S184957.) We agree with

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to provide that a prisoner sentenced to state prison for whom the sentence is executed is entitled to one-for-one presentence custody credits (i.e., one day of credit for every day actually served) unless he or she (1) is required to register as a sex offender; (2) was committed for a serious felony; or (3) has a prior conviction for a serious or violent felony. (Stats. 2010, *supra,* § 1; § 2933, subd. (e).)

the reasoning expressed by the courts in the majority and conclude that the amendment to section 4019 applies retroactively to cases that were pending on its effective date because the amendment mitigates punishment. Accordingly, we shall order the judgment modified to award appellant an additional 57 days of conduct credits, for a total of 89 days of presentence good conduct credits.[3]

DISPOSITION

The judgment is modified to award appellant 178 days presentence custody credit, consisting of 89 days actual custody credit and 89 days good conduct credit. The trial court shall prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.*

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[3] Appellant was awarded 89 days actual custody credit and 32 days good conduct credit. In calculating the conduct credits, the court apparently did not include the 22 days appellant served in actual custody prior to the revocation and reinstatement of her probation on June 15, 2008. We accept the People's implicit concession (assuming we reject their claim that the amendments to section 4019 do not apply retroactively) that the 22 days should be included in the calculation of appellant's credits, and that she is thus entitled to an additional 57 days conduct credit (i.e., 89 days actual custody credit and 89 days (32 + 57) conduct credit).

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Mark C. Kim, Judge

Superior Court County of Los Angeles

Augustine H. Vargas for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Lance E. Winters, Senior Assistant Attorneys General, Lawrence M. Daniels, Supervising Deputy Attorney General, Roberta L. Davis, Sonya Roth, Deputy Attorneys General, for Respondent.